



## **LIBRARY OF CONGRESS**

### **U.S. Copyright Office**

#### **37 CFR Parts 201, 202**

**[Docket No. 2016-10]**

#### **Group Registration of Photographs**

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Final rule.

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**SUMMARY:** The U.S. Copyright Office is modernizing its practices to increase the efficiency of the group registration option for photographs. This final rule modifies the procedure for registering groups of published photographs (GRPPH), and establishes a similar procedure for registering groups of unpublished photographs (GRUPH).

Applicants will be required to use a new online application specifically designed for each option, instead of using a paper application, and will be allowed to include up to 750 photographs in each claim. The “unpublished collection” option (which allows an unlimited number of photographs to be registered with one application), and the “pilot program” (which allows an unlimited number of published photographs to be registered with the application designed for one work) will be eliminated. The corresponding “pilot program” for photographic databases will remain in effect for the time being. The final rule modernizes the deposit requirements by requiring applicants to submit their photographs in a digital format when using GRPPH, GRUPH, or the pilot program for photographic databases, along with a separate document containing a list of the titles and file names for each photograph. The final rule revises the eligibility requirements for GRPPH and GRUPH by providing that all the photographs must be created by the same

“author” (a term that includes an employer or other person for whom a work is made for hire), and clarifying that they do not need to be created by the same photographer or published within the same country. It also confirms that a group registration issued under GRPHH or GRUPH covers each photograph in the group, each photograph is registered as a separate work, and the group as a whole is not considered a compilation or a collective work.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice; Sarang Vijay Damle, General Counsel and Associate Register of Copyrights; Erik Bertin, Deputy Director of Registration Policy and Practice by telephone at 202-707-8040 or by email at *rkas@loc.gov*, *sdam@loc.gov*, and *ebertin@loc.gov*.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The Copyright Act gives the Register of Copyrights (the “Register”) the discretion to allow groups of related works to be registered with one application and one filing fee. *See* 17 U.S.C. 408(c)(1). Congress cited “a group of photographs by one photographer” as an example of a “group of related works” that would be suitable for a group registration. H.R. REP. NO. 94-1476, at 154 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5770; S. REP. NO. 94-473, at 136 (1975). When large numbers of photographs are grouped together in one application, however, information about the individual works may not be adequately captured. Group registration options therefore

require careful balancing of the need for an accurate public record and the need for an efficient method of facilitating the examination of those works.

On December 1, 2016, the Copyright Office (the “Office”) published a Notice of Proposed Rulemaking (“NPRM”) setting forth proposed amendments to the current regulation governing the group registration option for published photographs (“GRPPH”), and proposing to create a new group registration option for unpublished photographs (“GRUPH”). *See* 81 FR 86643 (Dec. 1, 2016).

The NPRM described six major proposals. First, the proposed rule would require applicants to use a new online application specifically designed for registering a group of published photographs or a group of unpublished photographs, in lieu of using a paper application. Second, it would eliminate the “pilot program” that allows applicants to register an unlimited number of published photographs with the online application designed for registering one work.<sup>1</sup> It also proposed to eliminate the registration accommodation that allows applicants to register an unlimited number of photographs as an “unpublished collection.”<sup>2</sup> Third, the proposed rule would limit the number of photographs that may be included within each application to no more than 750 photographs. Fourth, the NPRM provided that all of the photographs must be created by

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<sup>1</sup> As noted in the NPRM, the Office is not proposing to eliminate the corresponding “pilot program” for photographic databases. 81 FR at 86643, 86649 n.21. Applicants may continue to register these types of databases with the online application at least for the time being. 37 CFR 202.3(b)(5)(ii)(A).

<sup>2</sup> The Office recently issued a separate notice of proposed rulemaking that proposed to eliminate the “unpublished collection” option and replace it with a new group registration option for unpublished works (GRUW). Briefly stated, the GRUW option would allow applicants to register up to five unpublished works with one application and one filing fee (with certain limited exceptions for claims involving sound recordings). *See* 82 FR 47415, 47417 (Oct. 12, 2017). To be clear, the GRUW option is not intended to replace the GRUPH option described in today’s final rule. Photographers will be able to register up to 750 photographs with the GRUPH option. *See* 81 FR at 86653; 82 FR 52258 (Nov. 13, 2017).

the same photographer (similar to the requirement that applies under the current regulation governing GRPPH), and further provided that the photographs must be published within the same nation. Fifth, the proposed rule would modify the deposit requirement for GRPPH, GRUPH, and photographic databases by requiring applicants to submit (i) a digital copy of each photograph,<sup>3</sup> and (ii) a separate document containing a list of the titles and file names for each photograph. Finally, the NPRM confirmed that when a group of photographs is registered under GRPHH or GRUPH, the registration covers each photograph, each photograph is registered as a separate work, and “the group as a whole is not considered a compilation, [or] a collective work . . . under sections 101, 103(b), or 504(c)(1) of the statute.”<sup>4</sup>

The Office received comments from several individuals, the Copyright Alliance,<sup>5</sup> and the Coalition of Visual Artists,<sup>6</sup> which consists of ten separate organizations that represent photographers, illustrators, designers, and other visual artists (“CVA”).<sup>7</sup> The commenters generally supported the Office’s proposal to eliminate the paper application and require applicants to submit their claims using an online application specifically

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<sup>3</sup> 17 USC 408(b), (c).

<sup>4</sup> The NPRM clarified that this same presumption does not apply when photographs are registered as part of a photographic database under 37 CFR § 202.3(b)(5), because a database is, by definition, a compilation. *See* 81 FR at 86653-54.

<sup>5</sup> The Copyright Alliance endorsed the views expressed by the Coalition of Visual Artists, in addition to submitting its own comments.

<sup>6</sup> The Coalition is comprised of the following organizations: the American Photographic Artists (APA), American Society of Media Photographers (ASMP), Digital Media Licensing Association (DMLA), Graphic Artists Guild (GAG), North American Nature Photography Association (NANPA), National Press Photographers Association (NPPA), Professional Photographers of America (PPA), the PLUS Coalition (PLUS), Schaftel & Schmelzer, and Doniger/Burroughs.

<sup>7</sup> The Office received comments from five individuals, including three photographers. All of the comments submitted in response to the NPRM can be found on the Copyright Office’s website at <https://www.copyright.gov/rulemaking/group-photographs/>.

designed for GRPPH and GRUPH.<sup>8</sup> They welcomed the proposal to eliminate the “pilot program” for published photographs, and to replace the “unpublished collections” accommodation with a new group registration option for unpublished photographs.<sup>9</sup> They also agreed that photographers should be entitled to claim a separate award of statutory damages for each photograph when they register their works under the GRPPH or GRUPH option.

Nearly all of the commenters objected to the proposed limit on the number of photographs that may be included in each claim. Some commenters said it would be difficult to determine if a particular photograph should be registered as a published or unpublished work. Some expressed concern that all of the photographs would have to be created by the same photographer and published in the same nation. Others expressed concern about the obligation to submit digital deposits. Finally, one commenter suggested that photographers should be entitled to seek the same legal remedies, regardless of whether they register their works using GRPPH, GRUPH, or the pilot program for photographic databases.

Having reviewed and carefully considered the comments, the Office now issues a final rule that closely follows the proposed rule, with some alterations based on these

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<sup>8</sup> See Copyright Alliance Comment at 2; CVA Comment at 6. The Office also issued a separate NPRM that proposed a similar online-filing requirement for seeking a supplementary registration. See 81 FR 86656 (Dec. 1, 2016). Under the rule proposed in that proceeding, most applicants would be required to file an online application to correct or amplify the information in an existing registration. The Office explained that this same online-filing requirement would apply when applicants seek to correct or amplify the information in a registration for a group of photographs or a photographic database. See 81 FR at 86648. The CVA expressed some concern about this proposal. CVA Comment at 10-15. The Office previously addressed those comments when it issued a final rule in the rulemaking on supplementary registration. See 82 FR at 27426.

<sup>9</sup> See Copyright Alliance Comment at 1-2; CVA Comment at 4.

comments, which are discussed in more detail below.<sup>10</sup>

## **II. Discussion of Comments**

### *A. Online Application and Digital Deposits*

When this final rule goes into effect, applicants will be required to use the online applications designated for GRPPH and GRUPH. If an applicant attempts to use a paper application, the Office will refuse to register the claim. Applicants will be required to submit a digital copy of each photograph,<sup>11</sup> either by uploading the photographs to the electronic registration system or by sending them to the Office on a physical storage device, such as a flash drive, CD-R, or DVD-R.<sup>12</sup> In addition, applicants will be required to submit a separate document containing a sequentially numbered list that identifies the title and file name – and in the case of published photographs, the month and year of publication – for each photograph in the group.

The Copyright Alliance supported this proposal, and predicted that online filing would “facilitate economy and efficiency.” Copyright Alliance Comment at 2. The CVA agreed that “[d]elivering images via the internet has become the norm for the majority of photographers and other visual artists,” and that “it is reasonable to require visual creators to submit deposit images in digital format.” CVA Comment at 6, 35. The CVA also

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<sup>10</sup> The final rule makes a few technical amendments to the proposed rule that match amendments that were recently made to §§ 202.3 and 202.4. *See* 82 FR 29410, 82 FR 52224 (Nov. 13, 2017).

<sup>11</sup> The NPRM stated that applicants would be able to submit their photographs in the same formats listed in the current regulation, namely, JPEG, GIF, TIFF, or PCD. 81 FR at 86651; 37 CFR 202.20(c)(2)(xx). Although the CVA supported this proposal, the Office did not include the PCD format in the final rule, because the electronic registration system will not accept these types of files. *See* [www.copyright.gov/eco/help-file-types.html](http://www.copyright.gov/eco/help-file-types.html).

<sup>12</sup> The CVA offered some suggestions for standardizing the size, dimension, resolution, and compression of each image. CVA Comment at 35. The Office did not include these suggestions in the final rule, because the electronic registration system should be able to accept any digital image, as long as it is submitted in an acceptable file format and the file size does not exceed 500MB.

agreed that uploading a list containing title and publication information would be preferable to the pilot program where applicants are expected to enter each title in the application one by one. CVA Comment at 34.

The CVA acknowledged that photographers who use traditional film often “reproduce or scan” their images and “deliver their work via electronic means.” CVA Comment at 6. The CVA also acknowledged that there are fee-based services available for photographers who need help completing the online application and submitting a digital deposit. CVA Comment at 6. However, the CVA and the Copyright Alliance expressed concern that some of these creators may have “vast archives” of photographs fixed in “traditional print media,” and they encouraged the Office to maintain the paper application for two-years to give these creators time to “catalog, archive, and register their works.” Copyright Alliance Comment at 2; CVA Comment at 7.

The Office recently issued a final rule for group registration of contributions to periodicals that addressed similar concerns. *See* 82 FR at 29412. As in that rule, a specific provision is being added to the regulations making clear that in an exceptional case, if photographers are unable to submit a digital copy of their works, they may request special relief and submit an actual copy of each photograph or other identifying material in lieu of a digital file. 37 CFR 202.20(d)(1)(iii)-(iv).

In addition, the Office is developing several new resources to ease the transition to the online filing requirement. The Office will prepare an online tutorial that explains how to use the new applications, and “help text” within the applications themselves that will provide answers to frequently asked questions. The Office will update the sections of the *Compendium of U.S. Copyright Office Practices, Third Edition* (“*Compendium*”) that

discuss the Office's practices and procedures for group registration. The Office also intends to issue a new circular that will provide a general introduction to GRPPH and GRUPH. And as noted in the NPRM, the Office will contact each applicant that participated in the existing pilot program and notify them that this program has been replaced with a new procedure. 81 FR at 86647.

*B. Number of Photographs that May Be Included in the Group*

The NPRM proposed to limit the number of works that may be included in each submission to no more than 750 photographs. This would represent a change in policy. Currently applicants may submit an unlimited number of photographs if they register their works as an unpublished collection, or if they use the pilot program for published photographs. By contrast, if they use a paper application submitted on Form VA and Form GR/PPh/CON, they may include no more than 750 photographs in each claim.

The Copyright Alliance, the CVA, and three individuals objected to this proposal. They commented that the limit would be burdensome, because many photographers take thousands of photographs in a single day.<sup>13</sup> They commented that photographers would have to pay more fees to register the same number of photographs as before, and that they would be unable to pass these additional fees on to their clients.<sup>14</sup> Before imposing a limit on the number of photographs that may be registered under GRPPH or GRUPH, the

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<sup>13</sup> The CVA commented that the 750 limit is “unnecessary,” “unworkable,” “contrary to the way most photographers” work, and “an arbitrary impediment to registering works as part of a visual artist’s nature workflow.” CVA Comment at 16. Photographer Eric Bowles commented that the proposed limit would be “completely unsuitable for event photographers, wedding photographers, sports photographers, or nature photographers,” because they typically take “1000-2000 photos or more on a regular basis in a single day.” Eric Bowles Comment.

<sup>14</sup> Under the current pilot program for published photographs, the CVA commented that photographers may register 7500 photographs for \$55. Under the proposed rule, the CVA commented that photographers would have to file 10 applications to register the same number of works at the “prohibitive cost” of \$550. CVA Comment at 16.



commenters encouraged the Office to monitor the actual cost of examining these claims to determine if there is a substantial increase in the Office's workload. CVA Comment at 17.

After carefully reviewing the comments and weighing the issues involved, the Office has decided to adopt the 750 limit proposed in the NPRM. As mentioned above, the Office imposes the same limit when applicants use Form VA and Form GR/PPh/CON. That requirement has been in place since 2005. 70 FR 15587, 15588 (Mar. 28, 2005). Since the Office introduced the pilot program for published photographs in 2012, the Office has monitored the cost of examining claims submitted through the electronic registration system. Based on this experience, the Office has concluded that 750 is a reasonable limit for GRPPH and GRUPH given its current staffing levels, the current filing fee for these group registration options, and the technical capabilities of the current system.<sup>15</sup>

When the system is functioning properly, it takes approximately 15 to 30 minutes to examine a claim involving 750 photographs or fewer. By contrast, a claim involving more than 750 photographs typically requires an hour or more to complete. Applicants

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<sup>15</sup> To be clear, the 750 limit adopted in this final rule only applies to claims submitted under the group registration options for GRPPH and GRUPH. It does not apply to the pilot program for photographic databases. Applicants may continue to register an unlimited number of published photographs under this option, at least for the time being. But the Office intends to revisit this issue in a separate rulemaking or as part of its upcoming fee study. The Office notes that at least one database provider registered 57,040 photographs between 2012 and 2016. According to the Digital Media Licensing Association (DMLA), this company filed 29 applications during this four-year period, and each submission contained an average of 1966 photographs. If the Office imposed a 750 limit on the pilot program for photographic databases, the DMLA stated that this company would have filed another 48 applications during this same period. CVA Comment at 41. The Office recognizes that this would require additional filing fees, and that those fees would have amounted to \$660 per year. That is less than what the Office currently charges for expedited handling for one application under the current fee structure. And it represents a significant bargain for the privilege of registering nearly 60,000 photographs with 77 applications, instead of preparing a separate submission for each work.

often fail to provide publication dates, they fail to list the dates in chronological order, or the dates provided in the application do not match the dates given in the deposit. If the applicant submits each photograph as an individual file, instead of uploading them in a .zip file, the examiner must click separate links to open each photograph. If any of the files are corrupt, the examiner must write to the applicant to request a new submission. The increasing work associated with these claims has had an adverse effect on the timeframe for examination of other types of works within the Visual Arts Division.

There also may be problems once the claim has been approved. The title field in the Office's public database will not accept more than 999 characters, but there is no corresponding limit in the registration application. When applicants submit more than 750 photographs, the information in the title files often exceeds these character limits. When this occurs, the Office must review each record one by one to identify the registration that was rejected by the system. Then the examiner must contact the applicant to request permission to amend the title field, he or she must update the record, and issue a new certificate.

Moreover, when applicants upload thousands of photos to the electronic registration system, it strains the system as a whole. This has an adverse effect on other applicants, because it delays the receipt of their submissions and it prevents the Office from issuing an email acknowledging the receipt of those claims. Many applicants then contact the Office's help desk to confirm that their submission was received, which places additional strains on the Office's limited resources.

Registering 750 photographs with the same application and the same filing fee represents a significant value and provides significant legal benefits. An applicant who

submits the maximum number of photographs effectively would pay \$0.07 to register each work under the current fee structure. As discussed below, the Office will examine each photograph in the group, and if the claim is approved, the registration covers each photograph and each photograph is registered as a separate work. Thus, if the photographs are subsequently infringed, the copyright owner should be entitled to seek a separate award of statutory damages for each individual photograph. *See* 17 U.S.C. 504(c)(1) (authorizing a separate award of statutory damages “with respect to any one work”).

The Visual Arts Division estimates that 75% to 80% of the applicants who register their works using the pilot program include fewer than 750 photographs in each claim. Thus, the final rule will not have an adverse effect on the vast majority of applicants. The Office recognizes that some applicants routinely include more than 750 works in each claim, and going forward, these applicants will need to file multiple applications instead of submitting all of their photographs with the same application. But it is important to recognize that the final rule does not impose any limit on the number of applications that may be submitted at a given time.

The CVA surveyed 1744 photographers and asked them to identify the average number of photographs that they take in a single day and over the course of a single month. The vast majority of the respondents—70%—reported that they take fewer than 750 photos on an average day, while another 17% reported that they take between 751 and 1500 photos on an average day. This presumably represents the average rate for a daily photo shoot, but it seems unlikely that the average photographer would create this many images on every day of the month. The CVA’s survey supports this assumption.

The results indicate that during an average month nearly half of the respondents—47%—would be able to register all the photos with four applications or fewer, and during a slow month, the majority of the respondents—61%—would be able to register all of their photos with one submission.

The CVA encouraged the Office to expand the scope of the group registration option by developing a tiered filing fee based on the number of photographs included within each claim, or a sliding-scale subscription model that would let photographers register an unlimited number of photographs with an annual, semi-annual, or quarterly filing fee. CVA Comment at 17. The Copyright Alliance and another individual expressed similar views. Copyright Alliance Comment at 3; Brian Powell Comment.

The Office welcomes these suggestions. But unfortunately, the current registration system is not capable of supporting this type of fee structure.

The Office, however, is beginning preparations for the initial development of its next generation registration system,<sup>16</sup> and will take the commenters' suggestions into account in developing the business requirements for the new system. In the near future, the Office will be seeking additional comments and conducting extensive outreach to gather additional suggestions and recommendations for the new system.

### *C. Distinguishing Between Published and Unpublished Photographs*

Under the rule proposed in the NPRM, applicants would be able to register a group of unpublished photographs or a group of published photographs, but they would not be able to combine published and unpublished photographs in the same claim. *See* 81

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<sup>16</sup> *See generally* Modified U.S. Copyright Office Provisional IT Modernization Plan (Sept. 5, 2017), available at <https://www.copyright.gov/reports/itplan/>.

FR at 86650. After considering the comments, the Office has decided to maintain this requirement in the final rule.

The CVA commented that it is difficult to separate published and unpublished photographs, in part, because photographers do not know if or when their images are published after they have been sent to a particular client. CVA Comment at 29. The Copyright Alliance expressed similar concerns. Copyright Alliance Comment at 3.

At the same time, however, the CVA and the Copyright Alliance acknowledged that the Copyright Act requires applicants to separately identify published and unpublished works for purposes of registration, and that this requirement cannot be changed without amending the law. CVA Comment at 29, 59; Copyright Alliance Comment at 3. Moreover, this distinction is firmly embedded in the current electronic registration system and the Office's internal processes. For example, when the Office issues a certificate of registration, the prefix assigned to the certificate begins with the letters VA if the work is published, and it begins with the letters VAu if the work is unpublished. If an applicant attempted to combine published and unpublished works in the same claim, the resulting registration number would be misleading. The Office may revisit this issue when it develops the business requirements for its new registration system, but for the time being, it is not feasible to ignore these distinctions within the context of the current system.

The CVA also commented that the photographers who participated in its survey would prefer to register all of the photographs that they create for a particular job, project, or client with the same application, regardless of whether those photographs are published or unpublished. CVA Comment at 31, 48-49. The final rule provides that

flexibility. When registering a group of photographs under GRPPH or GRUPH, applicants will be asked to provide a title for the group as a whole. If a photographer wants to register the works he or she created for a particular client, the group title provides a convenient means for adding that information to the record. If a photographer needs to file separate applications for his or her published and unpublished photographs, the applicant may assign the same title to each application followed by the phrase “Group 1 of 3,” “Group 2 of 3,” and so on.

The CVA acknowledged that photographers should be able to determine if their photographs are published or unpublished if they are given proper guidance. CVA Comment at 31. The CVA and the Copyright Alliance also acknowledged that the *Compendium* provides useful information and asked the Office to make this document accessible from within the electronic registration system. CVA Comment at 29; Copyright Alliance at 3. As mentioned above, the Office intends to update the sections of the *Compendium* that discuss this group registration option, and it intends to add examples to explain the difference between published and unpublished photographs. In addition, the Office intends to prepare a new circular that summarizes the various options for registering photographs, and will provide links to these resources from within the help text for the new applications.

*D. The Photographs Must Be Created by the Same Author (Including a Work-Made-for-Hire Author), Rather than the Same Photographer*

The NPRM proposed that all the photographs must be taken by the same photographer. If the photographs were created as works made for hire, the NPRM proposed that, in order to be eligible for group registration, all the photographs in the

group must have been taken by the same employee, and the applicant must have identified both the employer and the employee in the application. To register photographs taken by different photographers, applicants would be required to submit a separate application for each individual. *See* 81 FR at 86649-50. Both of these proposals were based on the regulation that currently governs GRPPH.<sup>17</sup> *See* 37 CFR 202.3(b)(10)(ii), (ix).

The CVA commented that commercial studios often use multiple photographers and assistants during each photo shoot, and that a shoot involving a particular job or client may occur on different dates. Given the way these studios operate, the CVA said it would be “impractical” to segregate their photographs into separate groups, and it would be “time consuming and expensive” to prepare a separate application for each photographer.<sup>18</sup> CVA Comment at 26-27. One individual expressed similar concerns and suggested that applicants should be allowed “to include up to three photographers working under contract for a single copyright owner.” Eric Bowles Comment.

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<sup>17</sup> When the Office established these requirements in 2001, it relied on the statement in the legislative history citing “a group of photographs by one photographer” as an example of a “group of related works.” *See* 66 FR 37142, 37148 (July 17, 2001); H.R. REP. NO. 94-1476, at 154. The Office also relied on the statutory and regulatory requirements governing the group registration option for contributions to periodicals, which permit “a single registration for a group of works by the same individual author.” *See* 66 FR at 37148; 17 USC 408(c)(2).

<sup>18</sup> The NPRM stated that “the Office will not accept applications claiming that two or more individuals jointly created each photograph in the group as a joint work.” 81 FR at 86650. The CVA commented that some photographers work as a team with both partners jointly owning each photograph, and that the proposed rule would prevent these teams from registering their works. CVA Comment at 26. It is unclear from the CVA’s comments whether these photographs would be considered joint works or works made for hire. On rare occasions, the Office has received inquiries from applicants expressing interest in registering a photograph as a joint work. But to be effective, a group registration option must be narrowly tailored to fit the claims that are most frequently received, and it cannot be expected to accommodate exceptional cases that fall outside of these expected norms.

Section 408 of the Copyright Act authorizes the Register to “require or permit . . . a single registration for a group of related works.” 17 U.S.C. 408(c)(1). The statute indicates that the Register has “general authority” to determine whether “particular classes” of works are sufficiently related to warrant group registration. 17 U.S.C. 408(c)(1), (2). After considering the comments, the Office has determined that this requirement may be met if the photographs were created by the same “author” (a term that includes an employer or other person for whom a work is made for hire), if the works are owned by the same claimant, and in the case of published photographs, if the works were published in the same calendar year.<sup>19</sup> Therefore, photographs can be included in one group even if they were created by different employees, as long as the photographs were created by the same author as works for hire.

The final rule does not represent a change in policy for most photographers. When an individual creates a photograph, that individual is considered the “author” of the work, and thus, the “author” and the “photographer” are the same person. But it does represent a change in policy for works made for hire. When a photograph is created as a work made for hire, the employer or commissioning party is considered the author and owner of the work, rather than the photographer who actually created the image. Thus, if the photographs were created as works made for hire, the applicant may name the employer or commissioning party as the author/claimant, instead of dividing the photographs into separate groups and submitting a separate application for each photographer.

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<sup>19</sup> In this respect, the final rule is similar to the group registration option for photographic databases, which may be registered if the updates or other revisions are owned by the same claimant and were created or published within a three month period. 37 CFR 202.3(b)(5)(i)(A), (F).



For similar reasons, work-made-for-hire authors do not need to identify their employees in the application. However, the Office developed the new application before it decided to modify this requirement; as a result, the application contains a space where applicants may provide employee information. If the applicant checks the work made for hire box – but fails to complete the employee space – the application will not be accepted by the electronic registration system. The Office intends to remove this space in a future update to the system. In the meantime, work made for hire authors who are unwilling or unable to identify their employees may complete this portion of the application by stating that the individual photographer(s) are “not named in the application.”<sup>20</sup>

*E. The Photographs Do Not Need To Be Published Within the Same Country*

When registering a group of published photographs, applicants should identify the author’s country of citizenship or domicile, as well as the country where the photographs were published for the first time. The Office will use this information to determine if the photographs are eligible for registration under U.S. copyright law. 17 U.S.C. 104(b)(1)-(2); 409(2), (8).

The NPRM further proposed that all the photographs within each group should be published in the same country. 81 FR at 86650. This proposal was based on the current limitations of the electronic registration system. To identify the nation of publication in the current system, applicants must select from a list of countries appearing in a drop down menu, but the system will not allow applicants to select two or more countries from this list.

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<sup>20</sup> If the claim is approved this information will appear in the online public record as follows: “employer for hire of photographer not named in the application.”

The CVA objected that photographers would need to prepare separate applications if their works are published in multiple countries. The CVA also noted that it may be difficult to determine where a photograph was published for the first time, particularly if the work was published online. CVA Comment at 32-33.

The Office did not include the single-country requirement in the final rule. In most cases, the Office should be able to determine if the photographs are eligible for copyright protection based on the author's citizenship or domicile. If the applicant is unable to establish eligibility based on this information, the Office may ask the applicant to confirm that the photographs were published in a country that has entered into a copyright treaty with the United States. If the photographs were published in different countries, the applicant may provide that information in the application in the "Note to Copyright Office" field.

*F. The Scope of Protection for Photographs Registered under GRPPH and GRUPH vs. Photographs Registered under the Pilot Program for Photographic Databases.*

The Copyright Alliance and the CVA agreed that photographers should be entitled to claim a separate award of statutory damages if they register their works under the GRPPH or GRUPH option. *See* Copyright Alliance Comment at 2; CVA Comment at 4. The Copyright Alliance also agreed that GRPPH and GRUPH would provide "more comprehensive and effective legal protections" than a registration for a photographic database, because photographers who register their works as part of a database would only be entitled to seek one award of statutory damages for the database as a whole. *See* Copyright Alliance Comment at 2. Although one member of the CVA disagreed with

this view of the scope of a database registration,<sup>21</sup> the Office continues to believe that the view it expressed in the NPRM is the correct one. *See* 81 FR at 86653-86654. Regardless, under the Copyright Act and the Office’s regulations, a group registration of published photographs (GRPPH) or a group registration of unpublished photographs (GRUPH) will expressly be treated as a separate registration for each photograph that is included within the group, and applicants who wish to ensure the availability of separate statutory damages awards should select one of those group registration options.

#### *G. Additional Considerations*

The Copyright Alliance and CVA also asked the Office to create a new group registration option for other types of visual art works, such as illustrations, video clips, and textile designs. Alternatively, they asked the Office to create another pilot program that would allow visual artists to register groups of related works with the online application that is designed for registering one work. Copyright Alliance Comment at 2, 4; CVA Comment at 5, 8-9, 27, 46-47, 49, 51-52, 56, 60. The Office recognizes a need for establishing new and updated practices for examining and registering visual art works.<sup>22</sup> The Office is considering these issues and will take them into account when developing its priorities for future upgrades to the electronic registration system.

The CVA also offered some suggestions for improving the current system. It encouraged the Office to improve the user interface, and allow applicants to populate each field with information stored in a spreadsheet or other database instead of entering it by hand. CVA Comment at 8. In addition, the CVA encouraged the Office to collaborate

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<sup>21</sup> CVA Comment at 45 (noting that DMLA contended that “databases [should] not be considered compilations,” and that “individual images” should be “treated in the same way,” regardless of whether they are registered under GRPPH, GRUPH, or as part of a photographic database).

<sup>22</sup> *See generally* Copyright Protection for Certain Visual Works, 80 FR 23054 (Apr. 24, 2015).

with third parties to develop apps and APIs that would help photographers register works directly from their cameras and photo editing programs. CVA Comment at 6, 36. The Office welcomes these suggestions. As mentioned above, the Office is in the early stages of developing the business requirements for its next generation registration system, and it will be seeking further comment on these issues in the future.

Finally, the CVA suggested that a registration for an unpublished work would be more effective if copyright owners could claim statutory damages and attorney's fees for any infringements occurring within three months before the effective date of registration (similar to the rule that applies to published works under section 412(2) of the Copyright Act). CVA Comment at 48. The CVA also suggested that the Office could create a "deferred examination" procedure, whereby the Office could issue a "provisional" registration after examining a sampling of the photographs in each group (similar to a provisional patent or intent to use trademark registration). If the photographer wanted to enforce the copyright in a particular photograph, he or she could ask the Office to conduct a "full" examination of that photograph for an additional fee. CVA Comment at 57-58.

The Office does not express any views on these suggestions, but simply notes that this rulemaking is not the proper forum in which to address them. The registration requirements CVA identified in its comments are part of the Copyright Act and the Office cannot expand or create exceptions to them as part of this rulemaking.

## **List of Subjects in 37 CFR Parts 201 and 202**

Copyright.

## **Final Regulations**

For the reasons set forth in the preamble, the U.S. Copyright Office amends 37 CFR parts 201 and 202 as follows:

## **PART 201 – GENERAL PROVISIONS**

1. The authority citation for part 201 continues to read as follows:

**Authority:** 17 U.S.C. 702.

2. Amend § 201.3 as follows:

- a. Redesignate paragraphs (c)(3) through (19) as paragraphs (c)(4) through (20), respectively;
- b. Add new paragraph (c)(3); and
- c. Revise newly redesignated paragraph (c)(4).

The revision and addition read as follows:

### **§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.**

\* \* \* \* \*

(c) \* \* \*

(3) Registration of a claim in a group of published photographs or a claim in a group of unpublished photographs	55
(4) Registration for a database that predominantly consists of photographs and updates thereto:	
(i) Electronic filing	55
(ii) Paper filing	65

\* \* \* \* \*

## **PART 202 - PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT**

3. The authority citation for part 202 continues to read as follows:

**Authority:** 17 U.S.C. 408(f), 702.

### **§ 202.3 [Amended]**

4. Amend § 202.3 as follows:

a. In paragraph (b)(3) remove the phrase “, subject to the limitations in paragraph (b)(10)(v) of this section” .

b. Remove and reserve paragraph (b)(10).

6. Amend § 202.4 as follows:

a. Add paragraphs (h) and (i).

b. In paragraph (l) remove “(9), or (10).” and add in its place “or (9).” .

c. In paragraph (n) remove “paragraph (g) or (k)” and add in its place “paragraphs (g) through (i) or paragraph (k)”.

The additions read as follows:

### **§ 202.4 Group Registration.**

\* \* \* \* \*

(h) *Group registration of unpublished photographs.* Pursuant to the authority granted by 17 U.S.C. 408(c)(1), the Register of Copyrights has determined that a group of unpublished photographs may be registered in Class VA with one application, the required deposit, and the filing fee required by § 201.3(c) of this chapter, if the following conditions are met:

- (1) All the works in the group must be photographs.
- (2) The group must include no more than 750 photographs, and the application must specify the total number of photographs that are included in the group.
- (3) All the photographs must be created by the same author.
- (4) The copyright claimant for all the photographs must be the same person or organization.
- (5) The photographs may be registered as works made for hire if all the photographs are identified in the application as such.
- (6) All the photographs must be unpublished.
- (7) The applicant must provide a title for the group as a whole
- (8) The applicant must complete and submit the online application designated for a group of unpublished photographs. (The Office will not register a group of unpublished photographs as an unpublished collection under § 202.3(b)(4)(i)(B).) The application may be submitted by any of the parties listed in § 202.3(c)(1).
- (9) The applicant must submit one copy of each photograph in one of the following formats: JPEG, GIF, or TIFF. The file name for a particular photograph may consist of letters, numbers, and spaces, but the file name should not contain any other form of punctuation. The photographs may be uploaded to the electronic registration system together with the required numbered list, preferably in a .zip file containing all the photographs. The file size for each uploaded file must not exceed 500 megabytes; the photographs may be compressed to comply with this requirement. Alternatively, the photographs and the required numbered list may be saved on a physical storage device, such as a flash drive, CD-R, or DVD-R, and delivered to the Copyright Office together

with the required shipping slip generated by the electronic registration system.

(10) The applicant must submit a sequentially numbered list containing a title and file name for each photograph in the group (matching the corresponding file names for each photograph specified in paragraph (h)(9) of this section). The title and file name for a particular photograph may be the same. The numbered list must be contained in an electronic file in Excel format (.xls), Portable Document Format (PDF), or other electronic format approved by the Office, and the file name for the list must contain the title of the group and the case number assigned to the application by the electronic registration system (*e.g.*, “Title Of Group Case Number 16283927239.xls”).

(11) In an exceptional case, the Copyright Office may waive the online filing requirement set forth in paragraph (h)(8) of this section or may grant special relief from the deposit requirement under §202.20(d), subject to such conditions as the Associate Register of Copyrights and Director of the Office of Registration Policy and Practice may impose on the applicant.

(i) *Group registration of published photographs.* Pursuant to the authority granted by 17 U.S.C. 408(c)(1), the Register of Copyrights has determined that a group of published photographs may be registered in Class VA with one application, the required deposit, and the filing fee required by § 201.3(c) of this chapter, if the following conditions are met:

- (1) All the works in the group must be photographs.
- (2) The group must include no more than 750 photographs, and the application must specify the total number of photographs that are included in the group.
- (3) All the photographs must be created by the same author.



- (4) The copyright claimant for all the photographs must be the same person or organization.
- (5) The photographs may be registered as works made for hire if all the photographs are identified in the application as such.
- (6) All the photographs must be published within the same calendar year, and the applicant must specify the earliest and latest date that the photographs were published during the year.
- (7) The applicant must provide a title for the group as a whole.
- (8) The applicant must complete and submit the online application designated for a group of published photographs. The application may be submitted by any of the parties listed in § 202.3(c)(1).
- (9) The applicant must submit one copy of each photograph in one of the following formats: JPEG, GIF, or TIFF. The file name for a particular photograph may consist of letters, numbers, and spaces, but the file name should not contain any other form of punctuation. The photographs may be uploaded to the electronic registration system together with the required numbered list, preferably in a .zip file containing all the photographs. The file size for each uploaded file must not exceed 500 megabytes; the photographs may be compressed to comply with this requirement. Alternatively, the photographs and the required numbered list may be saved on a physical storage device, such as a flash drive, CD-R, or DVD-R, and delivered to the Copyright Office together with the required shipping slip generated by the electronic registration system.
- (10) The applicant must submit a sequentially numbered list containing the title, file name, and month and year of publication for each photograph in the group (matching the

corresponding file names for each photograph specified in paragraph (i)(9) of this section). The title and file name for a particular photograph may be the same. The numbered list must be contained in an electronic file in Excel format (.xls), Portable Document Format (PDF), or other electronic format approved by the Office, and the file name for the list must contain the title of the group and the case number assigned to the application by the electronic registration system (*e.g.*, “Title Of Group Case Number 16283927239.xls”).

(11) In an exceptional case, the Copyright Office may waive the online filing requirement set forth in paragraph (i)(8) of this section or may grant special relief from the deposit requirement under §202.20(d), subject to such conditions as the Associate Register of Copyrights and Director of the Office of Registration Policy and Practice may impose on the applicant.

\* \* \* \* \*

7. Amend § 202.20 as follows:

- a. Revise paragraph (c)(2)(vii)(D)(8).
- b. Remove paragraph (c)(2)(xx).

The revision reads as follows:

**§ 202.20 Deposit of copies and phonorecords for copyright registration.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(vii) \* \* \*

(D) \* \* \*

(8) In the case of an application for registration of a database that consists predominantly of photographs (including a group registration for revised or updated versions of such a database), “identifying portions” shall instead consist of all individual photographs included in the claim. Photographs must be submitted in digital form in one of the following formats: JPEG, GIF, or TIFF. In addition, the applicant must submit a sequentially numbered list containing the title and file name – and if the photographs have been published, the month and year of publication – for each photograph in the group. The title and file name for a particular photograph may be the same and may consist of letters, numbers, and spaces, but the file name should not contain any other form of punctuation. The numbered list must be contained in an electronic file in Excel format (.xls), Portable Document Format (PDF), or other electronic format approved by the Office. The file name for the list must contain the title of the database, and the case number assigned to the application by the electronic registration system, if any (*e.g.*, “Title Of Database Case Number 162883927239.xls”). The photographs and the numbered list may be uploaded to the electronic registration system with the permission and under the direction of the Visual Arts Division, preferably in a .zip file containing these materials. The file size for each uploaded file must not exceed 500 megabytes; the photographs may be compressed to comply with this requirement. Alternatively, the photographs and the numbered list may be saved on a physical storage device, such as a flash drive, CD-R, or DVD-R, and delivered to the Copyright Office together with the required shipping slip generated by the electronic registration system or with a paper application submitted on Form VA.

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Dated: December 19, 2017

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**Karyn Temple Claggett,**  
*Acting Register of Copyrights and  
Director of the U.S. Copyright Office*

Approved by:

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**Carla D. Hayden,**  
*Librarian of Congress*

**[BILLING CODE 1410-30-P]**

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